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Supreme Court of the United States

October Term, 1974

No. 74-551

H. CLIFFORD LEE, *et al.*,
Petitioners,

vs.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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December 9, 1974

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The Response to the Petition for Certiorari:

1. Correctly states that "Petitioners here have consistently claimed" that the 1970 state court judgment (on the basis of which the widow has been stripped of her widow's share in her husband's estate) cannot be res judicata of the widow's claim and correctly states the basis of that claim.[1]

2. Correctly argues that if the November 22, 1974, decision of the Supreme Court of Minnesota[2]

[1] See page 8 of the Response by The Bush Foundation, et al., concurred in and adopted by the Attorney General and by the brief filed on behalf of the Executors of the husband's estate.

[2] Printed in the Appendix to the Brief of Respondent The Bush Foundation, et al.

stands, the widow's claim to her statutory share in her husband's estate is foreclosed.

However, the decision by the Supreme Court of Minnesota now relied upon by Respondents rests upon a massive denial of due process because it assumes as "facts" matters *on which there has never been hearing or adjudication by any court.* If that denial of federal constitutional right is not cured upon Petition for Rehearing which these Petitioners filed on December 6, 1974, Petitioners will bring the issue to this Court.

The Petition for Rehearing now pending before the Minnesota Supreme Court is reproduced in the Appendix to this Reply. It reveals the quicksand which alone is the foundation of the Minnesota Supreme Court decision.

This Court, therefore, should withhold ruling on the present Petition for Certiorari to await the final decision of the Supreme Court of Minnesota. If that court does not cure its denial of federal constitutional right, this Court can consolidate the present Petition for Certiorari with a new one directed to the Minnesota Supreme Court judgment, and, before this Court rules, thus have before it the full tawdry picture of fraud by which this widow has been done out of her statutory share of her husband's estate, and for which she clearly is entitled to assert her claim for damages for breach of that contract of settlement.

Respondents' assurance that the widow is "down to her last $130 million"[3] does not excuse their fraudulent breach of the contract of settlement they made with this widow, in reliance upon which she forebcre filing the renunciation she had signed, nor does it cure the denial of due process by which she has been stripped of her rights.

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[3] Page 13 of the Response by The Bush Foundation, et al.

It but makes the fraud the greater and the need for this Court's scrutiny the more imperative.

Respectfully submitted.

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APPENDIX

Petition for Rehearing filed December 6, 1974, by these Petitioners directed to the Minnesota Supreme Court decision of November 22, 1974, identifying the denial of federal constitutional right on which the Minnesota Supreme Court decision rests.

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State of Minnesota
In Supreme Court

In re Estate of ARCHIBALD G. BUSH, Deceased

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,

Appellants,

vs.

HERSCHEL S. ARROWOOD and MARY JEAN DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased.

and

THE BUSH FOUNDATION,

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,

Respondents.

PETITION FOR REHEARING

Appellants, Executors of the Estate of Edyth D. Bush, deceased, petition for rehearing of this Court's decision in this cause on the grounds:

1. **This Court has decided the case under misapprehension of fact.** The Court decided as it did in the belief that Judge Godfrey's decision in *Bush v. Arrowood* is res judicata of the widow's right to renounce. The Court so held in the mistaken belief that:

> "Mrs. Bush has agreed to a consent judgment which has been entered by a court having jurisdiction over the cause of action;" (Opinion, p. 16)

> "the individual rights of Mrs. Bush were disposed of." (Opinion, p. 17)
>
> "That she was represented by competent counsel must be conceded. That she knew what she was doing must likewise be conceded." (Opinion, p. 20)
>
> "Mrs. Bush was kept apprised of what was being done and of the action taken in her behalf by her attorneys." (Opinion, p. 20)

Were these the facts, there would be no quarrel with this Court's decision.

But whether these are facts **has never been adjudicated by any court.** On these matters there has never been a hearing in any court.

There is no question that the widow was represented by competent counsel. Being competent, they never entered the personal appearance of Mrs. Bush. The only appearance they ever made in instituting the action (A. 114, 148-149), in the Reply to the Counterclaim by Attorney General (R. 26, 30), in the Stipulation of Settlement (A. 149, 158), was on behalf of "plaintiffs," who, as this Court recognized (Opinion, p. 16), were the Class B Directors in their representative capacity.

Under this Court's decisions, counsel could not enter appearance on behalf of their clients without their clients' consent, *Park, Grant & Morris v. Shannon & Mott Co.* (1918), 140 Minn. 60, 167 N.W. 285, and assuredly, as this Court ruled in *Matteson v. Blaisdell* (1921), 148 Minn. 352, 355, 182 N.W. 442, 443:

> "We regard it as settled in this state that the attorneys had no implied authority to settle and compro-

> mise plaintiff's lawsuit without his knowledge or consent."

If, as this Court held, Olsen's individual rights are not determined by a judgment against him as trustee, *Olsen v. Linster* (1960), 259 Minn. 189, 191, 197 N.W.2d 49, 50, and Bamka's individual rights are not barred by a judgment against him as guardian ad litem, *Bamka v. Chicago, St. P., M. & O. R. Co.* (1895), 61 Minn. 549, 552, 63 N.W. 1116, it is obvious that the widow's personal rights cannot (without overruling a good deal of precedent) be foreclosed by judgment entered in the derivative action brought by the Class B Directors on behalf of the Foundation.

It is no answer that the widow was not authorized by the Foundation to represent the Foundation. (Opinion, p. 9.) That is the very nature of a derivative action. The individual is heard to speak because the entity for whose benefit the action is brought will not.

Here the widow **could not consent.** When the judgment was entered, the widow was, **and had been for more than a year,** disabled by a massive stroke from which she never recovered and for which the Florida court was to adjudge her incompetent and appoint guardians for her. (A. 257.)

2. **The widow's right has been taken away without the procedural due process the Constitution requires.** This Court considered it "difficult to understand what appellants expect to accomplish by this litigation." (Opinion, p. 22.) The widow gave up her right to one-half her husband's estate in reliance on the settlement. (A. 27.) But,

once the settlement was made and approved by the probate courts in Minnesota and Florida, and the statutory period for renunciation had passed, the Executors and the Class A Directors of the Foundation did a complete about face. They:

1. Pursued the Probate Judge to the ski slopes in Vail, Colorado, and **without notice to the widow, her colleagues or her counsel,** obtained an **ex parte** order vacating the adjudication that The Bush Foundation **is** the "residuary legatee" and vacating the order to make distribution to The Bush Foundation.

2. Activated the A.G. Bush Institute, a paper corporation established by the husband a year before his death. It had never had a meeting, had no assets, no bylaws, no officers. It was named in the Will as an alternate to receive the residue **if** The Bush Foundation "be unable to take * * *." The belated resurrection of the Institute signaled the determination of the Executors and the Class A Directors to substitute the Institute as the residuary legatee in place of the Foundation.

3. Petitioned the probate court to vacate the order approving the settlement. The petition ultimately was dismissed by the probate court and the adjudication approving the settlement therefore still stands. There is the real res judicata in this litigation.

This is not a pretty picture.

These facts cry for examination.

It is no answer that the widow is dead. Contract rights are not extinguished by death. The widow is entitled either:

1. To be given the right to renounce, or

2. To recover damages for breach of the contract of settlement. Her damages are a recovery of what she gave up, **viz:** one-half of her husband's estate.

This right has been taken away without any examination of the facts by any court. There has been no hearing at any time in any court on these facts. That this is a denial of due process is clear from decisions such as *Sniadach v. Family Finance Corp.* (1969), 395 U.S. 337, holding wages cannot be garnished without notice or hearing; *Goldberg v. Kelly* (1970), 397 U.S. 254, holding that welfare benefits may not be taken away without notice and hearing; *Fuentes v. Shevin* (1972), 407 U.S. 67, holding a debtor's goods may not be seized without notice and hearing.

This Court may be able, on some ground not yet developed, to strip the widow of her right to renounce because the statutory period has expired, but the Court should not in this action undertake to pass on the question whether the widow has a right to damages. That issue was not, and could not be, before the probate court from which this appeal comes. The **only** jurisdiction the probate court had was to pass on renunciation. "Since the probate court did not have jurisdiction to determine the issue of fraud," neither does this Court, because "our jurisdiction is only appellate * * *." *Bulau v. Bulau* (1940), 208 Minn. 529, 532-3, 530, 294 N.W. 845, 848, 846. Nor did the probate court have jurisdiction to determine an action for damages for breach of contract. (Respondent Bush Foundation Brief, pp. 24-25).

3. **The decision in this case exceeds the proper bounds of appellate judicial review.**

> "It is the general rule that the province of the supreme court is to determine questions of law and not to make findings of fact." *Kennedy v. Thompson Lumber Co.* (1947), 223 Minn. 227, 281, 26 N.W. 2d 459, 461.
>
> "It is not the province of this court to make or amend findings of fact nor can we assume facts to be proven except in those rare cases where they are conclusively established." *Lehman v. Hansord Pontiac Co.* (1955), 246 Minn. 1, 12, 74 N.W.2d 305, 312.

While a district court is not required to make findings of fact pursuant to Rule 52 in ruling on a motion for summary judgment, the above authorities proscribe the right of this Court to determine facts or to assume facts to be proven.

Each of the quotations from the decision of this Court set out under point 1 above is a statement of fact which this Court either is making or assuming to have been proven. Each is an issue of material fact which has never been adjudicated. These "assumed facts" could not properly have been determined by the court below on a motion for summary judgment. **Respondents below did not direct themselves to any one of these facts.** There is absolutely nothing in the record below or in the prior case of *Bush v. Arrowood*, either in the proceedings before Judge Godfrey or in the appeal on the issue of whether the Attorney General or his special counsel were entitled to be paid for their

services from a charitable trust, which would support the conclusions which this Court now assumes are facts.

It is conceded that the attorneys for the plaintiffs were most competent counsel. But nowhere in the record in *Bush v. Arrowood* is there the slightest indication that these counsel were ever retained by Mrs. Bush to represent her in an individual capacity or that they in fact did. Every appearance which counsel made, every pleading which they signed, the Stipulation of Settlement, was as attorneys for plaintiffs in their representative capacity.

This Court has stated that "Mrs. Bush answered this counterclaim in her personal capacity without seeking dismissal of it." (Opinion, p. 16) In view of the conceded competence of the attorneys representing the plaintiffs, if any proper conclusion is to be drawn therefrom it is that they deliberately responded to the counterclaim of the Attorney General solely on behalf of the plaintiffs in the representative capacity in which the action had been brought and deliberately avoided any personal appearance on behalf of Mrs. Bush individually.

The Court further said:

> "It is also abundantly clear that the stipulation of settlement upon which the Godfrey decision was based determined Mrs. Bush's personal rights as well as any she might have in a representative capacity. It was agreed, among other things, that she could retain the payment of $2,100,000;" (Opinion, p. 16)

It cannot be disputed that the August 1966 settlement was based on mutual considerations between Mrs. Bush, The Bush Foundation, and the Executors of the Estate of

A. G. Bush. It must be conceded that the consideration for the payment to Mrs. Bush of $2,100,000 was the settlement of the "free of charge" dispute. It must be further conceded that the consideration for which Mrs. Bush agreed to withhold the filing of her executed renunciation was the agreement of The Bush Foundation to establish a bicameral board in a form which would give to Mrs. Bush and the other directors of her choice a veto power over the operations of The Bush Foundation. This assured in perpetuity that the charitable intent of the donors, Mr. and Mrs. Bush, would be carried on. It must be further conceded that this consideration was taken away by the Godfrey judgment.

These are "facts" which the court below refused to accept. These are "facts" which this Court has overlooked by **making** or **assuming** "facts" which never have been established.

Still referring to the Godfrey decision, this Court went on to say:

> "She also agreed to waive any right to renounce her husband's will." (Opinion p. 16)

This is a most unfortunate misstatement of fact which nevertheless apparently influenced the Court in reaching its conclusion that there was identity of causes of action. It rests solely on the recitation in Judge Godfrey's opinion that in the settlement agreement of August 26, 1966, Mrs. Bush waived her right to renounce.

4. **The Court has misapplied dictum.** The Court (p. 19) has given effect to its 1972 dictum, on an issue **then**

not even before the Court, as a prejudgment of this case. This Court explained (p. 18):

> "The Court had hopes at that time [in 1972] that by indicating our belief that the Godfrey judgment [of 1970] was res judicata it would end this protracted litigation. Apparently our hopes were not realized."

The Court could not have so written had it recalled that the right to renounce now here before the Court was not even mentioned, let alone claimed or in issue, in the Judge Godfrey proceedings that this Court reviewed in 1972. The only question the Court then had before it was the right of the Attorney General to be paid counsel fees for his services in that litigation. This Court said that this was the **only** question then before it.

> "The reasonableness of the total charges made by respondents in rendering their services to the attorney general is not in dispute. The **only question** on this appeal is the validity of the court's order directing that the foundation pay a portion of these attorneys' fees." *Bush v. Arrowood* (1972), 293 Minn. 243, 247, 198 N.W.2d 263, 265.

By no rule of law may a court by dictum in 1972, on a point not before it, decide an issue to come before the court in 1974. The only precedent there is for this is in *Alice in Wonderland,* where is laid down the rule: "Sentence first—verdict afterward."

State v. Rainer (1960), 258 Minn. 168, 177, 103 N.W. 2d 389, 390, relied on by this Court, has no application to the case at bar. The statement in its 1972 case that

this Court relied upon, that (p. 17), "a judgment was entered in district court [in 1970] which disposed of the right of the widow to renounce the will of Mr. Bush," was neither "necessary to the decision," nor (p. 19) was it "an expression of opinion on a question directly involved and argued by counsel."

The right of renunciation was in no way involved in the case before Judge Godfrey or in the 1972 appeal to this Court on the limited question relating to attorneys' fees. No reference to the right of renunciation can be found either in the entire record of that case below or in the briefs filed in this Court. The fact that the services performed by the special counsel for the Attorney General were of substantial benefit to The Bush Foundation was never in dispute. The trial court did not delineate the specific nature of such benefit, nor was it "necessary to the decision" for this Court to do so. The only issue before this Court was whether the Attorney General or his special counsel were entitled to recover attorneys' fees for such services from a charitable trust fund under the equitable rule of "substantial benefits". This Court held there was no right to such fees. The factual recitation in this Court's 1972 decision was not "an expression of opinion on a question directly involved and argued by counsel." It was no part of the decision of the Court on the sole issue to be decided on that appeal.

This Court should rather have followed the rule enunciated in *State v. Rainer*:

> "Of course, a ruling not necessary to the decision of a case can be regarded as only 'dictum' ". 258 Minn. at 179, 103 N.W.2d at 396.

Or the Court should have followed the rule stated in *State v. Naftalin* (1956), 246 Minn. 181, 74 N.W.2d 249 (opinion by then Justice Knutson) as follows:

> " 'Dicta', or more properly 'obiter dicta,' generally is considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases.
>
> * * *
>
> The reason for the rule of obiter dicta is obvious. The questions actually before the court and argued by counsel are thoroughly investigated, deliberately considered with care, and, when so investigated and considered, a decision on those issues is entitled to respect in future cases. Obiter dictum, on the other hand, is a statement of the judge on an issue not so deliberately investigated and, for that reason, is not entitled to the same respect." 246 Minn. at 208, 209, 74 N.W.2d at 266.

Or the Court should rather have followed the rule stated in a case subsequent to *State v. Rainer*, in which the Court in an opinion by then Chief Justice Knutson said:

> "The scope of any opinion by this Court is limited to the facts and issues involved in the decision, and anything said in excess of deciding these issues is pure dictum." *Haskin v. County of Hennepin, Glen Lake Sanatorium* (1964), 268 Minn. 21, 28, 127 N.W.2d 522, 527.

The present opinion is directly contrary to well established law. What was said in the former *Bush* case was dictum, and not even dictum of law. It was not entitled to any weight or consideration in the case at bar.

5. **The Court has mistakenly imposed a burden on Appellants that is foreign to the law governing summary judgment.** It was not incumbent upon Appellants to show, by affidavit of otherwise, (p. 20) "that the settlement was not made with Mrs. Bush's full consent." Nothing in *Rosvall v. Provost* (1968), 279 Minn. 119, 155 N.W.2d 900, relied upon by the Court (p. 20) supports such obligation. To the contrary, Respondents, to support their motions for summary judgment, must adequately "negate any issue of fact raised by the pleading." It is only then that the nonmoving party may not rely on assertions in his pleadings to create fact issues. This Court agreed (p. 20), "whether or not she consented to the stipulation is a question of fact." The Court mistakenly said (p. 20) the Godfrey Court "determined that issue adversely to her * * *." This statement is without any support.

The Godfrey Court at no time had this issue before it. This issue is raised for the first time in Appellants' Propositions of Law and Fact (A. 295, 301). This admitted fact issue was not controverted in any of the affidavits or documents submitted in support of Respondents' motions for summary judgment below nor in the additional documents included in Appellants' Appendix at the request of Respondents or in the Appendix of Respondents Arrowood and Dickman, none of which were presented to the court below. It needs to be remembered that:

> "* * * in passing upon a motion for summary judgment, the sole function of the trial court is, therefore, to determine whether there is an issue of fact to be tried." *Ahlm v. Rooney* (1966), 274 Minn. at 262, 143 N.W.2d at 68.

Neither the court below nor this Court could properly decide this fact issue on a motion for summary judgment because the moving party never negated the issue.

This Court went on to quote (p. 15) a portion of the opinion of the court below on the question involving the identity of the parties. In adopting this language and relying upon it, the Court overlooked *McMenomy v. Ryden* (1970), 286 Minn. 358, 176 N.W.2d 876. (Appellants' brief, p. 35.)

On the question of identity of causes of action, the Court ignored *State of Wisconsin v. Torinus* (1881), 28 Minn. 175, 9 N.W. 725 (Appellants' brief, p. 37), where the Court pointed out:

> "Care must be taken also to distinguish between **identity of the subject-matter of litigation and identity of cause of action—a distinction often overlooked.** The subject-matter of litigation may be the same, and yet the cause of action entirely different." (Emphasis by the Court). 28 Minn. at 180, 9 N.W. at 727.

Neither the court below nor the decision of this Court even attempts to delineate the issues involved in Judge Godfrey's decision that this court relied upon and the issues involved in the present litigation.

At no time subsequent to the August 1966 settlement, did Mrs. Bush or anyone on her behalf assert the right to claim her widow's share of her husband's estate until the institution of the present proceedings in the Probate Court of Ramsey County which are the starting point of the present litigation.

6. **The Court has improperly departed from the set-**

tled law governing the application ot the Rules of Civil Procedure as declared by the Court in *Nationwide Corp. v. Northwestern National Life Ins. Co.* (1958), 251 Minn. 255, 87 N.W.2d 671. If the Court intended to hold that all of the Rules of Civil Procedure are applicable to an appeal from the Probate Court of Ramsey or Hennepin County, this is contrary to the specific language of Rule 81.02.

If the decision is limited to permitting a motion for summary judgment on appeal from Probate Court of Ramsey or Hennepin County, the Court has erroneously determined that there is language in *M.S.A.* 525.72 which falls within the rule laid down in *Nationwide Corp. v. Northwestern National Life Ins. Co.* (1958), 251 Minn. 255, 87 N.W.2d 671.

Much can be said for making Rule 56 applicable to an appeal from the Probate Court of Ramsey or Hennepin County, but if that is to be done it should be by amendment of Rule 81.02 or by statutory amendment of *M.S.A.* 525.72 and not by judicial decision which ignores the meaning intended when the rule was adopted.

This is not a case in which it is suggested that (p. 23) a technicality should be **revived.** If it be a technicality that prior to the adoption of the Rules of Civil Procedure the only available pretrial motion to dismiss an appeal from the Probate Court was a motion for judgment on the pleadings, so be it. Rule 81.02 **preserved** that technicality. As this Court observed in *House v. Hanson* (1955), 245 Minn. 466, 72 N.W.2d 874:

"The words of a court rule, like those of a statute,

> must be taken and construed in the sense in which they were understood and intended at the time the rule was promulgated. Any other principle of construction would undermine confidence in the court's rule-making power." 245 Minn. at 473, 72 N.W.2d at 878.

7. **The Court erred in giving weight to the Federal District Court's decision.** The trial court relied on that decision (A. 371). This Court has compounded the error by adopting (p. 11) that portion of the trial court's opinion. The Federal Appeals Court affirmed the lower court decision **solely** on the ground of abstention and directed the lower court to dismiss the action **without** prejudice.

> "Accordingly, we affirm the decision of the district court solely upon the basis of abstention. We remand the case to the district court for the single purpose of modifying the judgment to reflect abstention as a basis for dismissal **rather than a decision on the merits."** *Bassler v. Arrowood* (1974), 500 F.2d 138, 143.

While Appellants have pending in the United States Supreme Court a Petition for Writ of Certiorari for the purpose of attempting to avoid the dismissal, even without prejudice, the prior determination of the United States District Court is no longer effective and the matter presently stands as though that action had never been commenced.

CONCLUSION

Unless this Court can find a basis for denying renunciation other than res judicata, it should remand the case for examination of the facts on which the widow has been done out of both the settlement and her statutory one-half of her husband's estate. The Court should make clear, if the widow is not now entitled to renounce, that whether she has a claim for damages for breach of the settlement contract is an issue to be resolved after trial in the proper court.

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